IN THE

Supreme Court of the United States

DOCKET NO. 78-1450

GEORGE DALEY,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

The petitioner, George Daley, respectfully prays that a Writ of Certiorari issue to review the denial of certification in this cause by the Supreme Court of New Jersey and the Judgment and Opinion of the Superior Court of New Jersey, Appellate Division, herein.

OPINION BELOW

The Supreme Court of New Jersey denied certification without opinion (Appendix at 24a). The Superior Court of New Jersey, Appellate Division issued an Opinion, not reported, which appears in the Appendix at 1a. The Judgment of Conviction appears in the Appendix at 22a.

JURISDICTION

The Supreme Court of New Jersey denied certification in this matter on December 19, 1978. This petition for certiorari is filed within ninety days of said date in accordance with *Rule* 22 of this Court. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). Petitioner complains that he has been denied his right to a fair trial under the Sixth Amendment to the United States Constitution which provides in pertinent part that in all criminal prosecutions the accused shall enjoy the right to be tried by an impartial jury with a full opportunity to confront the witnesses against him.

In addition, petitioner maintains that the trial proceedings deprived him of rights guaranteed to him under the Fourteenth Amendment to the United States Constitution which provides in pertinent part in Section One:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law . . .

QUESTION PRESENTED

Was petitioner denied a trial by an impartial jury with confrontation of his accusers and subjected to deprivation of fundamental rights without due process of law as a result of the numerous, substantial and highly prejudicial instances of prosecutorial misconduct committed at his trial rendering a decision on the merits in a weak case improbable or even impossible?

STATEMENT OF THE CASE

Petitioner was indicted on January 6, 1975, in indictment No. 458-74, charging two counts of obtaining money by false pretenses, two counts of embezzlement and one count of aiding and abetting embezzlement. A total of six defendants were named in the indictment. Following a ten day trial, the jury returned a verdict of "guilty" against petitioner on two counts of obtaining money by false pretenses in violation of *N.J.S.* 2A:111-1 and acquitted him of all other charges. On August 1, 1975, his motions for judgment of acquittal and for a new trial were denied; an order was entered adjudging conviction and imposing sentence.

Petitioner appealed to the Superior Court of New Jersey, Appellate Division, which affirmed his conviction for the reasons set forth in its Opinion of June 13, 1978, reproduced herein at 1a-21a. The Supreme Court of New Jersey denied certification without opinion.

In his appeal to the Appellate Division, petitioner argued as to assignment of error that he was deprived of his Sixth Amendment right to a fair trial and his Fourteenth Amendment right to due process of law. The Appellate Division's Opinion, however, dismissed these contentions in a single paragraph which appears almost as if an afterthought (21a). Instead of exploring these substantial and important issues, the Opinion dwells at length on state statutes, case law and court rules.

Consequently, unless this Court grants certiorari, petitioner's claims of constitutional infringements of his fundamental rights of liberty and property will never be reviewed on the merits. Moreover, as a result of the affirmation of the conviction, the decision of the state courts will stand in contradiction of the applicable decisions of this Court.

As outlined in the Opinion of the Appellate Division (1a-6a), the case involved allegations relating to a real estate construction project. Petitioner was accused by one Moritz Nappe, the State's principal witness, of having obtained certain monies from him under false pretenses. Mr. Nappe maintained that his money did not go to pay for the project costs specified in accordance with petitioner's representations.

At best, the case submitted to the jury was very weak. The entire matter rested on Mr. Nappe's credibility. The weight to be properly afforded this individual's testimony is in serious doubt. Defense counsel obtained a psychiatric report on Mr. Nappe relating to the hospitalization of his physically abused son a few years earlier in which Dr. David Flicker, an eminent psychiatrist, characterized him as a habitual psychopath and liar. Despite motions made on behalf of petitioner and a codefendant, the trial court refused to order a psychiatric examination of Mr. Nappe to determine the current state of his mental health. Moreover, there was no admissible direct evidence that petitioner ever made the alleged false representation.

In the context of this fragile case, a series of highly prejudicial and improper statements were made by the prosecutor in the presence of the jury.

ARGUMENT

As this Court has often warned, in a weak case, the danger of prejudice to the accused as a result of improper statements by a prosecutor is highly probable and the entire circumstances should be closely scrutinized. *United States v. Socony-Vacuum Out Co., Inc.*, 310 U.S. 150, 239 (1940).

The prosecutor's conduct complained of here included the propounding of over one hundred improper questions against which objections were sustained. In twenty-seven of these questions, the prosecutor suggested that petitioner had made the misrepresentation as to how Mr. Nappe's money would be used, an ultimate issue of fact for the jury. Although there was no admissible direct evidence of such a representation, the proposition was put before the jury again and again through these improper questions. Similarly, the same technique was used in place of admissible evidence to establish that Mr. Nappe relied upon the alleged representation.

In addition, the prosecutor repeatedly suggested that he knew of certain evidence of petitioner's guilt, but was being precluded by the Court or defense counsel from revealing it. For example, he would say: "One of the essential elements of the crime I'm attempting to get out of the witness and I'm being precluded."

In *Berger v. United States*, 295 U.S. 78, 84 (1934), the Court addressed precisely this kind of situation observing that the prosecutor " . . . was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered . . . "

Noting that although objections to these actions were sustained by the trial judge, "It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken." *Berger*, at 85. Indeed, the Court determined in ordering a new trial that "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Id.* at 89. *Cf., State v. Farrell*, 61 N.J. 99, 102-03 (1972).

This Court has spoken plainly in ruling that "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand. . . ." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Moreover, there is no question that the full protection of the Sixth Amendment attaches in all state proceedings. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

In a weak case such as the one against this petitioner, the repeated misconduct of the prosecutor is of inestimable importance to the rights of the accused. *Berger, supra; Kitchell v. United States*, 354 F.2d 715 (1st Cir. 1965). As Mr. Justice Holmes noted in *Frank v. Mangum*, 237 U.S. 309, 349 (1926), "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." Perhaps applying this judicial maxim, this Court has not failed to act when procedures employed by a state involve such a probability that prejudice will result to a defendant that due process is deemed inherently lacking. *Estes v. Texas*, 381 U.S. 532, 542-43 (1965).

Writing for the Court in *In re Murchison*, 349 U.S. 133, 136 (1955), Mr. Justice Black declared that "our system of law has always endeavored to prevent even the

probability of unfairness." Surely, the prosecutor's effective "filling in" of two of the essential elements of the offense charged in this case coupled with his suggestions of suppressed evidence of guilt constitute, at least, grounds for finding a probability of unfairness in the subject trial proceedings.

CONCLUSION

For all of the foregoing reasons, petitioner seeks the granting of a Writ of Certiorari in this matter.

Respectfully submitted,

/s/ Alan Silber
ALAN SILBER
Attorney for Petitioner

RAYMOND I. KORONA, ESQ.
On the Brief

OPINION OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

MICHAEL SANDOMENO,

Defendant-Appellant.

Docket No. A-179-75

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

GEORGE DALEY,

Defendant-Appellant.

Docket No. 168-75

Argued November 28, 1977. Decided June 13, 1978 Before Judges Conford, Michels and Pressler.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County.

Mr. Joseph Meehan argued the cause for appellant Michael Sandomeno (Messrs. Meehan & Kenny, attorneys).

Messrs. Noonan and Flynn, attorneys for appellant George Daley (Mr. John J. Flynn on the brief).

Mr. Thomas N. Auriemma, Deputy Attorney General, argued the causes for respondent (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

The opinion of the court was delivered by MICHELS, J.A.D.

Defendants Michael Sandomeno (Sandomeno) and George Daley (Daley) were found guilty by a jury of two counts of obtaining money by means of false pretenses in violation of *N.J.S.A.* 2A:111-1. Their motions for judgment of acquittal and alternatively for a new trial were denied. Both defendants were sentenced to the Monmouth County Correctional Institution for two concurrent six month terms each. The custodial sentences were suspended. Both were placed on probation for a year and fined $1,000 on each charge. Both defendants appealed, and the appeals were consolidated.

According to the State's proofs, in the early part of June 1973, Moritz Nappe (Nappe), the State's principal witness, was introduced to Daley by Raymond Chera, a real estate entrepreneur. Daley told Nappe he was a builder and in need of money. The following day Daley met Nappe and showed him several construction projects in Monmouth and Ocean Counties in which he had an interest. He told Nappe that he needed $200,000 for a high rise condominium apartment project known as defendant Avenel Boulevard, Inc. (Avenel). Daley informed Nappe that if he invested $200,000 in the Avenel project he could have an option to participate as a partner in three other projects: the Marx, Hurricane Harbor and Windward Beach properties. Daley represented to Nappe that the $200,000 was necessary to complete the Avenel project model to sell the other condominium units in the project. Thereafter Nappe met with Sandomeno and Daley. Sandomeno told Nappe that he was only interested in the Avenel project. He tried to get Nappe to invest in Avenel.

On or about June 5, 1973 Sandomeno and Daley visited Nappe at his home. Sandomeno told Nappe that he wanted to show him some properties. Later that day Sandomeno and Nappe drove to several construction projects. Sandomeno indicated to Nappe that he owned 25% of the stock of the Avenel project. Several days later, Nappe met Daley and co-defendant Richard L. Bonello, a New Jersey lawyer, at the latter's offices and expressed a desire to invest $200,000 in the Avenel project. Bonello told Nappe that he had a long asociation with Driftwood Associates, Inc. (Driftwood), in which Daley and co-defendants Peter DeNigris and Mario Latella were partners. Bonello also told Nappe that DeNigris and Latella wanted to get out of Driftwood because they had other outside interests. Someone was needed to take their place and assist Daley. Bonello assured Nappe that if he invested the $200,000 in the Avenel project he "would make a nice profit on it." Specifically, Bonello represented to Nappe that he would make 10% of the net profits, profits which they estimated to be $1,800,000, in addition to the return of his $200,000 investment upon completion of the Avenel project. Daley told Nappe that the quicker an agreement could be reached the more advantageous it would be to him. At that meeting Daley again informed Nappe that he would like to get DeNigris and Latella out of Driftwood as soon as possible. Nappe indicated that he would have John Warren, Jr., his lawyer, and Morris Cinnamon, his accountant, look into the matter.

The following day Nappe met with Daley, Sandomeno and Chera. Daley told Sandomeno that Nappe intended to invest $200,000 in the Avenel project. Sandomeno repeated to Nappe that "it's a good investment and that we are going to make a nice profit on it" and said Nappe was "going to be an active participant and supervise the high rise condominium." Nappe told Daley and Bonello that he would need to apply for a loan and would be willing to put up stock as collateral for the loan. Bonello called Peter Beil, president of the Jersey Shore Bank and ar-

ranged for the loan. Within a day or two, Nappe met Bonello at the Jersey Shore Bank and was granted a $300,000 stock-secured extension of credit by the bank.

Thereafter, during the middle of June 1973, Nappe attended several meetings with Daley, Sandomeno and Bonello, and discussed the Avenel project. In particular, he discussed its date of completion, what funds were needed, where the money would go, and when he would get his money back. On several occasions during these meetings Sandomeno and Daley represented to Nappe that the project would be completed within a year. Daley specifically represented to Nappe that "the first thing, if the investment is made, that they need to finish up the model", referring to Nappe's investment in the Avenel project. They also discussed Nappe's role in the project. Daley instructed Dave Downs, the Avenel project supervisor, to show Nappe the Avenel project and how much work needed to be done. Nappe informed Daley and Sandomeno that he wanted options to be a partner in the other construction properties in addition to his $200,000 investment in the Avenel project.

On June 22, 1973 Daley telephoned Nappe at his home and stated: "I am very embarrassed. I promised people money. The furniture arrived for the model and the FIDELCO want certain changes made in the agreement and it will take a few days until the changes are made." The "FIDELCO" referred to by Daley was Fidelco Growth Investors from which Avenel had obtained a construction loan in the sum of $6,300,000, secured by a first mortgage on the project. Daley asked Nappe whether he would "advance them some money so that they can take the furniture because it is C.O.D. in Asbury Park." Daley stated that he needed $75,000 and repeated that he wanted

the money to "quicken up the work on the model and to pay the payroll." Sandomeno then spoke to Nappe generally repeating what Daley told him. He pressed for the immediate advance of the $75,000. Later that same day, Nappe met Daley and Sandomeno at the Jersey Shore Bank where Nappe indicated to Beil that he would like a check for $75,000. Beil handed Nappe a check for $75,000, which was apparently made out in advance of the meeting. Nappe endorsed the check in blank, informing everyone present that the money was advanced for the Avenel project "for the purpose of furniture and to have for the payroll for people which worked on the high rise." When Nappe endorsed the check, it did not contain the endorsements: "Pay to the order of Driftwood, Inc.", or "For Deposit, Credit of Driftwood Associates, Inc." Nappe left the check on Beil's desk with the clear understanding that it was to be turned over to Sandomeno and Daley after he left the bank.

The $75,000 check was deposited that day to the account of Driftwood, Inc. The evidence showed that as of June 21, 1973 there were no funds in the Driftwood account. After the check was deposited, checks were immediately drawn against it, reducing the balance to only $15,033.02. Some of the checks drawn against the $75,000 were endorsed by Daley, some were post-dated and some even cleared the bank before the date written on them. The State's proofs established that a substantial portion of the $75,000 turned over by Nappe to Sandomeno and Daley for the Avenel project was not used for or on behalf of that project. Rather, the moneys went to others, including Sandomeno, who received $25,000. Moreover, none of the money was used to pay for either the model's furniture or the model workmen's payroll as represented by Sandomeno and Daley. In fact, when Nappe went to the Avenel project shortly after turning the $75,000 check over to

defendants, he found that there was no furniture in the model unit.

Thereafter, on or about June 25, 1973, Nappe signed various documents relating to his investment in the Avenel project. On June 27, 1973 he obtained $125,000 from the Jersey Shore Bank which represented the balance of the $200,000 investment in the project. Nappe was given a check payable to "Avenel Boulevard, Inc.", which he turned over to Bonello. After Bonello received the check it was endorsed "Pay to the order of Anschelewitz, Barr, Ansell & Bonello", and signed on behalf of Avenel by Daley and Latella. The check was deposited in the Bonello law firm's trust account. Thereafter, checks payable to corporations and individuals other than Avenel were drawn against these funds, including a check to Sandomeno for $69,500.

At the conclusion of a lengthy trial, the jury acquitted defendants Avenel, Bonello, DeNigris and Latella of all charges. However, it found Sandomeno and Daley guilty of two counts of obtaining money by false pretenses, acquitting them of the remaining charges. This appeal followed.

Defendants Sandomeno and Daley seek a reversal of their convictions and the entry of judgments of acquittal or, alternatively, a new trial on both charges of obtaining money by false pretenses on the grounds hereinafter discussed. We have considered all of the contentions advanced by both defendants and find them to be without merit.

I.

Sandomeno contends that the trial judge erred in refusing to disqualify himself because "of possible bias against the defendants." The claimed bias is predicated upon

the trial judge's comment during a settlement conference in a totally unrelated civil action to the effect that "people who borrow money should repay it, that the law possibly should be changed because too many people are hiding behind corporations and not repaying money they borrowed with that pretext." The civil action involved a corporate debtor of which defendants Daley, Latella and DeNigris were principal stockholders. The comment was made by the trial judge during a general discussion concerning the liability of stockholders for corporate indebtedness. On the basis of that comment the judge subsequently disqualified himself because it was a non-jury case. Sandomeno, however, was not a party to that suit and was not a stockholder of the corporate debtor or in any other way involved in the litigation.

Sandomeno did not move for the disqualification of the trial judge in this criminal action and did not join in defendant DeNigris' motion for disqualification made at the commencement of the trial. Following an *in camera* hearing the trial judge denied the motion, stating in part:

> * * * maybe I was too hasty disqualifying myself in the note case because my remark was not directed to anyone personally at that time. I had expressed a general philosophy which I have had for many years and I still have. Maybe some day I will have an opportunity to make some new law in that regard, I don't know. Maybe the Legislature will, but insofar as this case is concerned I want to assure you gentlemen that as far as I'm concerned the named defendants in this case are absolutely unknown to me in any way whatsoever. I bear no malice, no bias, no prejudice. I recognize they are entitled to the fullest protection that the law provides them and as far as I'm concerned

that's what they're going to get until a jury says otherwise, and in view of the fact that I am not going to be the factfinder in this case in the first place I don't see any reason to disqualify myself.

The trial judge's expression of opinion concerning the legal issue in an unrelated civil action neither impugned his impartiality or fairness nor furnished a valid basis for his disqualification to preside at the trial. *See State v. Muraski*, 6 N.J. Super. 36, 38 (App. Div. 1949). Moreover, there has been no showing of prejudice or even potential bias on the part of the trial judge. Under the circumstances the trial judge properly exercised his discretion by refusing to disqualify himself from presiding at the trial of this matter. *See State v. Flowers*, 109 N.J. Super. 309, 311-312 (App. Div. 1970).

II.

Sandomeno contends that the joinder of all defendants in one trial was improper and prejudicial. He claims that the number of defendants, the number of both the transactions and the separate charges plus the length and complexity of the trial made it impossible for the jury to properly evaluate the evidence as to each defendant separately. We disagree.

Our rules provide that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses (*R.* 3:7-7). Multiple offenses may be charged in the same indictment if the offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. *R.* 3:7-6. Additionally, there may be a joint trial of all defendants charged under such indictment. *R.* 3:15-1. However, a defendant may move for a severance on the ground that a joint trial will prejudice his right to a fair trial. The trial judge may grant such relief if it appears that the defendant is prejudiced by the joinder of offenses or of defendants in the indictment. *R.* 3:15-2(b). A wide range of discretion necessarily reposes in the trial judge in ruling upon such a motion. *State v. Sinclair, et al.*, 49 N.J. 525, 550 (1967); *State v. Manney*, 26 N.J. 362, 366-369 (1958).

The joinder of all offenses and of all defendants in a single indictment was clearly authorized by our rules of court (*R.* 3:7-6 and *R.* 3:7-7). Here, there was a valid basis for a single trial of all offenses against all defendants. *See State v. Manney, supra.* Furthermore, there is nothing in the record before us to support Sandomeno's claim that the jury would be unable to evaluate the evidence and judge each defendant separately. The trial judge carefully and forcefully instructed the jury during the presentation of the evidence and again in his final charge so as to insure that it would evaluate the evidence and the charges as they pertained to each defendant. That the jury was able to comply with the trial judge's instructions in this regard is evident from the verdict. The jury acquitted all of the defendants, except Sandomeno and Daley, of all charges. It found Sandomeno and Daley guilty only of the two counts of the indictment charging them with obtaining money by false pretenses and acquitted them of the remaining counts. Under the circumstances, the trial judge did not mistakenly exercise his discretion by permitting a joint trial of all offenses against all defendants.

III.

Sandomeno and Daley both argue that the trial court erred in denying their pretrial and trial motions to compel a psychiatric examination of Nappe. They claim that the affidavits and documents submitted in connection with these motions, coupled with Nappe's trial testimony, demonstrated both the need and justification for such a psychiatric examination. They argue that Nappe's background, religious beliefs and prior conduct, including his criticism of the law enforcement authorities in handling the preliminary investigation, are suggestive of "possible mental derangement". As such they warranted a psychiatric examination to determine his competency as a witness. They emphasize, amonv other factors, that just about a year before the trial Nappe was accused by his wife of physically abusing their five year old child to such an extent that the child had to be hospitalized for treatment of the injuries. They also allude to the fact that Nappe's testimony in connection with a divorce action many years ago, characterized as "extrinsic" fraud by Chief Justice Vanderbilt in a dissenting opinion in *Nappe v. Nappe*, 20 N.J. 337, 358 (1956), demonstrates his failure to understand the nature and obligation of an oath.

Our study of the record in the light of defendants' contentions satisfies us that they failed to make a showing of such need or justification as would have warranted an order for the requested psychiatric examination. We are firmly convinced that under the circumstances the trial court did not mistakenly exercise its discretion by refusing to order a psychiatric examination of Nappe. In reaching this result, we emphasize that

> Manifestly, a practice of granting psychiatric examination of witnesses must be engaged in with great care. Orders to permit it to be done should be executed only upon a substantial showing of need and justification. Otherwise the course of trials would be unduly disrupted and their efficacy diminished. However, the boundaries of the court's discretion cannot be outlined with precision. Much reliance must be placed upon the judgment of the trial court in the individual case. [*State v. Butler*, 27 N.J. 560, 605 (1958).]

Cf. State v. Franklin, 49 N.J. 286, 287-288 (1967), rev'd on other grounds after remand 52 N.J. 386 (1968); *State v. Falcetano*, 107 N.J. Super. 375, 378-379 (Law Div.), order clarified 107 N.J. Super. 383 (Law Div. 1969).

IV.

Sandomeno advances the contention that there was a material variance between the indictment and the proofs adduced at trial. The first and third counts of the indictment charged defendants with, among other things, falsely representing to Nappe that if he would "invest" the sum of $200,000 with Avenel the money would be used by Avenel for the construction of a high-rise condominium. During the trial Nappe characterized his involvement in the transaction as a "loan" for which he was to receive a percentage of the profit, rather than interest. Thus, Sandomeno urges that since Nappe characterized the transaction as a loan, and there is a difference between a loan and an investment, the proofs did not conform to the indictment. We disagree.

It is firmly settled that an indictment must sufficiently identify the criminal event to enable the accused to defend and to defeat a subsequent prosecution for the same of-

fense. Thus, the indictment must allege all the essential facts of the crime. *State v. La Fera*, 35 N.J. 75, 81 (1961), rev'd on other grounds, 42 N.J. 97 (1964); *State v. Lamoreaux*, 29 N.J. Super. 204 (App. Div.), aff'd, 16 N.J. 167 (1954). However, it also is clear that the proofs developed need not adhere strictly to the allegations of the indictment. If the proofs substantially adhere to those outlined in the indictment and the indictment supplies sufficient information to apprise a defendant of the actual charge against him, thus avoiding any possible prejudice, and protects him against a subsequent prosecution for the same offense, the variance will be deemed immaterial. *State v. Lamb*, 125 N.J. Super. 209, 216-217 (App. Div. 1973); *State v. Davis*, 61 N.J. Super. 536, 540-541 (App. Div. 1960).

Sandomeno does not claim surprise or prejudice, and from our review of the record we are convinced that there was none. The manner in which the case was tried clearly indicates that Sandomeno was fully aware of the criminal conduct with which he and the other defendants were charged and what the State's case would be. The first and third counts of the indictment outlined in detail the factual basis of the charge of false pretenses. The first count specifically charged that as a result of defendants' false representations Nappe obtained a check in the amount of $75,000 from the Jersey Shore Bank and caused it to be delivered to Daley and Sandomeno for the express purpose represented, to wit, that it would be used for the construction of the Avenel high rise. The third count similarly charged that Nappe obtained a check in the amount of $125,000 from the Jersey Shore Bank and caused it to be delivered to Daley and Bonello for the construction of the high rise. While Nappe may have characterized the advance of the moneys to defendants as a

"loan", it is evident from his testimony that he also considered the transaction to be an "investment". Notwithstanding, what Nappe called the transaction is unimportant under the circumstances of this case. The essence of the transaction was the delivery of moneys by Nappe to defendants in reliance upon their fraudulent representations that the money, would be used by Avenel for the construction of the high-rise. The indictment outlines these essential facts.

Thus, we are convinced that (1) there was no material variance between the proofs and the indictment; (2) that Sandomeno's ability to prepare his defense was not impaired; and, (3) that he was not tried for offenses in any way different from the ones outlined in the indictment.

V.

We find no error, much less plain error, in the admission of Nappe's testimony as to oral representations and statements made by the various defendants, including Sandomeno, relating to the several written agreements entered into by Nappe and the defendants. Contrary to Sandomeno's claim, the parole evidence rule does not apply to bar the admission of this evidence. Defendants' representations and statements to Nappe were properly admitted into evidence as admissions. *See State v. Kennedy*, 135 N.J. Super. 513, 521-524 (App. Div. 1975).

VI.

There also is no merit in Sandomeno's claim that the trial court erred in excluding from evidence the records of the Central Jersey Bank and Trust Company pertaining to a loan application made by Nappe in October 1973.

Sandomeno claimed that this evidence established that in the latter part of 1973 Nappe was in financial difficulty, and it would impair Nappe's credibility by showing possible bias. This difficulty, it was argued, led him to make these charges against defendants. However, these records are not relevant to any substantive issue in this case. Moreover, whatever probative value they may have had in respect of credibility was substantially outweighed by the risk that their admission would necessitate undue consumption of time, and create a substantial danger of confusing the issues and of misleading the jury. In our view, the trial court properly exercised its discretion by excluding these records. *See Evid. R.* 4; *State v. Garfole,* N.J. (A-9477 decided May 1, 1978). *See also State v. Gallicchio,* 51 N.J. 313, 320-321 (1968); *cert. den.* 393 U.S. 912 (1969); *State v. Mathis,* 47 N.J. 455, 470-472 (1966). Beyond this, even if we were to make the dubious assumption that the trial court erred in excluding this evidence, Sandomeno was not prejudiced by it. Nappe was thoroughly cross-examined as to his financial condition in the latter part of 1973. He admitted to being short of cash and in financial difficulty at that time. Thus, the error alleged by Sandomeno did not reach dimensions "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it may otherwise not have reached." *State v. Macon,* 57 N.J. 325, 335-336 (1971). *See also State v. Bankston,* 63 N.J. 263, 273 (1973).

VII.

Sandomeno contends that the trial court erred in denying his motion for judgment of acquittal at the close of the State's case on both charges of obtaining money by false pretenses for failure to prove the essential elements

of these crimes. He claims that the State failed to prove that (1) Nappe advanced the $200,000 in reliance upon his alleged fraudulent misrepresentations and statements that the money was to be used for the Avenel project, specifically the finishing of the model unit and the payment of payroll; (2) that Nappe suffered any prejudice because the moneys he advanced were fully secured by a note executed by Avenel, payment of which was guaranteed both by Sandomeno and the other defendants (with the exception of Bonello) and by an assignment of the first $200,000 of the retainage held by Fidelco from the advances to be made for the construction loan; and, (3) he had an intent to defraud Nappe when he obtained the moneys from him.

The standard to be applied in determining a motion for judgment of acquittal under *R.* 3:18-1 at the conclusion of the State's case is set forth in *State v. Reyes,* 50 N.J. 454 (1967), as follows:

> * * * [T]he broad test for determination of such an application is whether the evidence at that point is sufficient to warrant a conviction of the charge involved. *R.R.* 3:7-6. More specifically, the question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt. [*Id.* at 458-459.]

See also State v. Mayberry, et al., 52 N.J. 413, 436-437 (1968), *cert. den.* 393 U.S. 1043 (1969); *State v. Kluber,* 130 N.J. Super. 336, 341-342 (App. Div. 1974), *certif. den.* 67 N.J. 72 (1975).

The obligation of this court in reviewing the determination of such a motion by the trial court is to consider the State's proofs in the light of the foregoing standard and to determine therefrom how the motion should have been decided. *State v. Reyes, supra; State v. Van Duyne,* 43 N.J. 369, 377 (1964), *cert. den.* 380 U.S. 987 (1965); *State v. Moffa,* 42 N.J. 258, 263 (1964). In our determination no consideration has been given to any evidence or reasonable inferences to be drawn therefrom adduced on defendant's case. *See State v. Reyes, supra; State v. Fiorello,* 36 N.J. 80, 86-91 (1961), *cert. den.* 368 U.S. 967 (1962).

We are convinced from our study of the record as a whole that the evidence and the logical inferences to be drawn therefrom considered in a light most favorable to the State at the end of its case was sufficient for the jury to find Sandomeno guilty beyond a reasonable doubt of obtaining money by false pretenses.

A.

N.J.S.A. 2A:111-1, in pertinent part, provides:

> Any person who, knowingly or designedly, with intent to cheat or defraud any other person, obtains any money, . . . by means of false promises, statements, representations, tokens, writings or pretenses, is guilty of a misdemeanor.

An essential element of the crime of false pretenses is reliance by the victim upon the fraudulent misrepresentation or statement of the defendant. *State v. Lemken,* 136 N.J. Super. 310, 318 (App. Div. 1974), *aff'd,* 68 N.J. 348 (1975); *State v. Thyfault,* 121 N.J. Super. 487, 503 (Cty. Ct. 1972), *aff'd,* o.b. 126 N.J. Super. 459 (App. Div. 1974); *State v. Zwillman,* 112 N.J. Super. 6, 12 (App. Div. 1970), *certif. den.* 57 N.J. 603 (1971); *State v. Allen,* 100 N.J. Super. 407, 409-10 (App. Div. 1968); rev'd on other grounds, 53 N.J. 250 (1969); *State v. Kaufman,* 31 N.J. Super. 225, 229 (App. Div. 1954), mod. on other grounds, 18 N.J. 75 (1955). The extent of reliance need not be great, sole or exclusive. However, it must be shown that the fraudulent misrepresentation or statement induced the victim to part with his money in order to sustain a conviction under *N.J.S.A.* 2A:111-1. *See State v. Zwillman, supra; State v. Lamoreaux,* 13 N.J. Super. 99, 103 (App. Div. 1951); *State v. Thatcher,* 35 N.J.L. 445, 448-449 (Sup. Ct. 1872).

Here it is evident that the jury could have found from the proofs that Nappe was induced to part with his $200,000 in reliance, in part, upon Sandomeno's fraudulent misrepresentations and statements. While no useful purpose would be served by reviewing all of the evidence which supports this conclusion, the following suffices. Sandomeno informed Nappe that he was interested in the Avenel project. After Daley and Bonello told Nappe that he would make 10% of the net profit plus the return of his investment, Sandomeno confirmed to Nappe that the Avenel project was a good investment that was going to make him a good profit. Sandomeno also told Nappe that he was going to be an active participant and supervise the high-rise condominium, which would be completed in one year. Thereafter, Sandomeno represented to Nappe, as Daley had previously done, that they needed $75,000 quickly to accept delivery of furniture for the model unit shipped C.O.D. and to pay the workmen on the project. They asked Nappe for the money which he agreed to supply.

Later the same day, Nappe went to the bank where he met Sandomeno and Daley and obtained a bank check for $75,000 issued against his line of credit. Nappe endorsed the check in blank and turned it over to Sandomeno and Daley. Subsequently, Nappe advanced the remaining $125,000 to them. Under the circumstances, we are convinced that a jury could find beyond a reasonable doubt that Nappe relied, in part, upon Sandomeno's fraudulent statements and misrepresentations in parting with the $200,000.

B.

We are satisfied that the State adduced sufficient evidence to permit the jury to find beyond a reasonable doubt that Nappe was prejudiced by acting in reliance upon Sandomeno's misrepresentations. To sustain a conviction under *N.J.S.A.* 2A:111-1, it was necessary for the State to prove that the victim suffered a loss or was prejudiced in some way. *State v. Kaufman, supra. See also* 2 *Wharton, Criminal Law and Procedure* (1957), § 602 at 360-361; 32 *Am. Jur.* 2d, *False Pretenses,* § 38 at 200. However, it is not necessary that the victim sustain a monetary loss. It is sufficient if the victim has merely incurred an obligation or even a future liability. The gravamen of the offense of false pretenses under *N.J.S.A.* 2A:111-1 is obtaining another's property or money by false pretenses. *See State v. Thatcher, supra* at 448; 32 *Am. Jur.* 2d, *False Pretenses, supra.* The offense is complete when the money or property has been obtained as a result of such false pretenses, and cannot be purged by subsequent restoration or repayment. *See* 32 *Am. Jur.* 2d, *False Pretenses, supra.* Thus, prosecution of defendant for false pretenses is not barred because a victim has been indemnified or may possibly be indemnified for his loss or because the restoration of a victim's property or the money has been made. The applicable rule is discussed in 2 *Wharton, Criminal Law and Procedure,* § 602 at 360, as follows:

> To constitute the offense of obtain-property by false pretenses it is necessary to show that the actions of the victim in reliance on the defendant's misrepresentations have caused the victim loss or that the victim has been prejudiced in some way. It is not necessary that the victim has sustained actual money loss. Loss is sustained even though the victim has incurred merely a conditional or future liability, such as that based on negotiable instruments. The fact that the victim has been indemnified or may possibly be indemnified for his loss, or that restoration of the property or money has been made, does not prevent the prosecution of the defendant for false pretenses.

The crime of false pretenses was committed if Nappe, in reliance on misrepresentations by Daley and Sandomeno turned over $75,000 and then $125,000 to them. The jury could have so found. That Nappe was prejudiced is obvious. He borrowed the $200,000 from the Jersey Shore Bank. He obtained the money by virtue of a stock secured loan from the bank which he was obligated to repay. While Nappe may possibly recover the $200,000 he turned over to defendant by collecting on the note from Avenel, from the individual defendants who guaranteed payment or from the first $200,000 retainages held by Fidelco from the construction loan advances, such possible future recovery does not bar Sandomeno's prosecution for false pretenses.

C.

There also is no merit in Sandomeno's claim that the State failed to prove that he had the requisite intent to defraud Nappe when he and Daley obtained the $200,000. The State's proofs show, as we have previously recounted, that on June 22, 1973 when Daley and Sandomeno informed Nappe that they needed the $75,000 immediately for the Avenel project he went to the bank and obtained a check in the required amount. The $75,000 check was endorsed in blank and turned over to Sandomeno and Daley. The check was deposited the same day in the Driftwood account and checks were immediately drawn against the funds, including a check in the sum of $25,000 made payable to Sandomeno.

On June 27, 1973 when Nappe turned over the $125,000 check to Bonello, the check was deposited in Bonello's law firm trust account. Checks were then drawn against these funds, payable to various corporations and individuals other than Avenel, including Sandomeno who received $69,500. The inference that Sandomeno intended to defraud Nappe when he and Daley obtained the funds is amply warranted. The issue was properly submitted to the jury which could reasonably have found such to be the fact.

Accordingly, the trial court properly denied Sandomeno's motion for a judgment of acquittal at the end of the State's case on both charges of obtaining money by false pretenses.

VIII.

We are satisfied that the trial judge properly denied Sandomeno's motion for a judgment of acquittal notwithstanding the verdict pursuant to *R.* 3:18-2. In reaching

this conclusion, we have carefully reviewed the record of this lengthy trial in the light of all of the arguments advanced by Sandomeno in support of his claim to the contrary and find them to be clearly without merit. *R.* 2:11-3 (e)(2).

IX.

Sandomeno argues that the trial court erred in denying his motion for a new trial pursuant to *R.* 3:20-1 on the ground that the verdict was against the weight of the evidence. From our review of the record we are convinced that the denial of the new trial motion was not a miscarriage of justice under the law. *R.* 2:10-1.

X.

Finally, both Daley and Sandomeno contend that (A) the character and conduct of the trial proceeding abrogated their right to due process of law, to confront the witnesses against them, and to a trial by an impartial jury; (B) the prosecutor's misconduct mandated a reversal of their convictions and a new trial; (C) the charge to the jury was improper; and, (D) the trial, when viewed in its entirety constituted a manifest injustice. We have considered these contentions carefully as well as the arguments advanced by defendants in their support and find them to be clearly without merit. *R.* 2:11-3(e)(2). We are satisfied from our study of the record of this lengthy trial that defendants were afforded a fair trial. The trial court did not commit any error warranting reversal of their conviction.

Affirmed.

A TRUE COPY

/s/ Elizabeth McLaughlin
Clerk

JUDGMENT OF CONVICTION

The defendant, being charged on January 6, 1975, on Indictment No. 458-74, for the crimes of Obtaining Money Under False Pretenses (*N.J.S.* 2A:111-1) (Counts 1 and 3), Embezzlement by Trustee (*N.J.S.* 2A:102-2) (Count 2) and Aid and Abet Embezzlement by Trustee (*N.J.S.* 2A:85-14 and *N.J.S.* 2A:102-2) and the defendant on January 24, 1975, having entered a plea of Not Guilty and thereafter, having on June 16, 17, 18, 19, 20, 23, 24, 26, 30, July 1, 2 and 3, 1975, been tried with a jury, and a verdict of Not Guilty as to counts two and six of the Indictment and Guilty as to counts one and three of the Indictment by Interrogatories, having been rendered on July 3, 1975;

It is, therefore, on August 1, 1975;

ORDERED and ADJUDGED that the defendant be and is hereby sentenced to the Monmouth County Correctional Institution for a period of six months on each of counts one and three of the Indictment to run concurrently. Sentence suspended and the defendant placed on probation for a period of one year and ordered to pay a fine of $1,000.00 on each count and no costs of court. There is no need to report to the Probation Department. Defendant may pay the fine on Monday, August 4, 1975.

REASONS FOR SENTENCE IMPOSED: Under all of the circumstances, I did not feel that a custodial sentence would be necessary or would accomplish any rehabilitative or punitive function. I feel that by suspending the jail sentence and putting him on probation for one year and imposing the maximum fine allowed by law was the proper

sentence in this case. His clean record and good status in the community indicate leniency.

/s/ Andrew A. Salvest
ANDREW A. SALVEST
Judge, Superior Court

Entered:

/s/ John R. Fiorino
JOHN R. FIORINO,
County Clerk.

August 1, 1975

ORDER DENYING CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, in Trenton, this 19th day of December, 1978.

Clerk

A TRUE COPY

Stephen Townsend
Clerk